COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

Middlesex, SS. **Docket No. 03-2512**

****
CROWN CASTLE ATLANTIC, LLC, *
Plaintiff *
*
vs. *
*
GUY A. MCKAY and SHERYLL MCKAY, *
*
Defendants *
****

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

Pursuant to Superior Court Rule 9A(b)(5), below is the Defendants, Guy A. McKay and Sheryll McKay's (hereinafter referred to as the "McKays") response to the Plaintiff, Crown Castle Atlantic, LLC's (hereinafter referred to as "Crown") statement of facts:

1. The McKays entered into a binding and enforceable Land Lease Agreement (hereinafter referred to as the "Lease") with Crown's predecessor in interest, Cellco Partnership d/b/a Bell Atlantic NYNEX Mobile ("BANM") on August 12, 1996, which was drafted by BANM. See Land Lease Agreement, (Exhibit 1), and Affidavit of Guy A. McKay and Sheryll E. McKay, (Exhibit 3), ¶ 2.

2. Under the terms of the Lease, the McKays agreed to lease "that certain parcel of property (hereinafter called "Property"), located at 982-988 Main Street, Acton,

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Massachusetts, and being described as a parcel containing about 3600 square feet, as shown on the attached Exhibit 'A1.'" See Exhibit 1, ¶ 1, and Cell Site Plan dated July 1996 and prepared by R.E. Cameron & Associates, Inc., for Bell Atlantic NYNEX Mobile (Exhibit 2), p. 2. This Plan was attached as Exhibit A1 to the Lease, but although the Lease was used as an exhibit in Crown's Complaint and its Motion for Summary Judgment, Crown did not include the Plan in either document.

3. Under the terms of the Lease, the McKays granted Crown's predecessor in interest "the non-exclusive right for ingress and egress, seven (7) days a week twenty-four (24) hours a day, on foot or motor vehicle, including trucks, and for the installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15') foot wide right-of-way extending from the nearest public right-of-way, Main Street, to the demised premises, *said Property and right-of-way for access being substantially as described herein in the attached Exhibit 'A1.'* See Exhibit 1, ¶1 (emphasis added), and Exhibit 2, p. 2. Again, Crown did not attach the Cell Site Plan to its Complaint or Motion for Summary Judgment, even though it specifically shows where the right-of-way granted under the Lease is located.

4. Under the terms of the Lease, the McKays agreed that "in the event any public utility is *unable to use* the aforementioned right-of-way, the Lessor hereby agrees to grant a *substitute* right-of-way either to the Lessee or to the public utility at no cost to the Lessee." See Exhibit 1, ¶ 1 (emphasis added). Also under the terms of the Lease, "all improvements shall be at Lessee's expense and the installation of

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all improvements shall be at the discretion and option of the Lessee. See Exhibit 1, ¶ 7.

5. The McKays have no knowledge or information about any contract between BANM and Mirra Construction (hereinafter referred to as "Mirra") to install the existing underground conduit, or whether New England Telephone Company (hereinafter referred to as "NETC") installed its copper wire telephone line through the underground conduit at the Property, as the McKays were not parties to these contracts. See Exhibit 3, ¶¶ 3 and 4.

6. The McKays have no knowledge or information about whether Mirra installed the underground conduit running under the right-of-way from Main Street across the Property to the communications tower facility, as the McKays were not parties to this contract. See Exhibit 3, ¶ 5.

7. The McKays have no knowledge or information about whether NETC installed the telephone line in the underground conduit running under the right-of-way from Main Street across the Property to the tower, as the McKays were not parties to this contract. See Exhibit 3, ¶ 6.

8. The McKays did not request that the underground conduit running under the right-of-way from Main Street to the Property be located in a certain location. Rather, during construction of the communications tower facility, the McKays consulted with Crown's predecessor as to where the right-of-way granted in the Lease running from Main Street to the Property should be constructed, given the constraints of zoning including setback requirements, as well as the McKays' use of the remainder of their property. See Exhibit 3, ¶ 7.

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9. The McKays entered into a binding and enforceable First Amendment to Land Lease Agreement (hereinafter referred to as the "Amendment") with Crown's predecessor in interest, Cellco Partnership, on November 10, 1997. See First Amendment to Land Lease Agreement (Exhibit 4).

10. Under the Amendment, the McKays agreed that the "Lessee has the right to sublet any portion of the Property, without consent of Lessor to any third party." Pursuant to the Zoning By-Law of the Town of Acton, purposes of the Special Requirements for Wireless Communication Facilities include limiting "the overall number and height of such facilities to what is essential to serve the public convenience and necessity" and promoting "the shared use of facilities to reduce the need for new facilities." Acton, Mass., Zoning By-Law § 3.10 (1997). As such, the McKays entered into several site license agreements as lessors with cellular telephone companies so that those companies could collocate their equipment within the leased property. The McKays maintain separate agreements with those companies for the use of the land within the 3600 square foot area, and Crown maintains separate agreements with those companies for connections to the communications tower. See Exhibit 4, ¶ 4.

11. By letter dated January 8, 1999, Attorney Michael S. Giaimo, legal counsel for Bell Atlantic Mobile ("BAM"), notified the McKays that BAM and Crown Castle International Corp. had formed a joint venture tower company, and that BAM assigned all of its right, title, interest and obligation under the Lease and the Amendment to the joint venture company. See Letter to the McKays from Attorney Michael S. Giaimo, (Exhibit 5), ¶ 1.

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12. In his letter, Attorney Giaimo requested that the McKays indicate their consent to the assignment. See Exhibit 5, ¶ 4.

13. Before signing the letter from Attorney Giaimo, the McKays first inquired of BAM as to whether the assignment would change any terms of the Lease. They received a letter from Sheila R. Becker, Manager, Real Estate/Zoning for BAM, that the joint venture was to be owned 1/3 by BAM and 2/3 by Crown, but that nothing but the Lessee would change under the Lease. See Letter to the McKays from Sheila R. Becker (Exhibit 6), ¶ 1. Having received such assurance, the McKays indicated their consent to the assignment by signing the letter from Attorney Giaimo and mailing it back to him.

14. As per the Memorandum of Assignment provided by Crown at Exhibit 5 of its Complaint, on March 31, 1999, BAM assigned its interest in the Lease to Crown.

15. The McKays have no knowledge or information as to whether the tower is currently serviced by a copper wire telephone line that had been installed in the underground conduit, as they did not oversee the installation. See Exhibit 3, ¶ 8.

16. The McKays have no knowledge or information as to whether Bell Atlantic n/k/a Verizon Communications (hereinafter referred to as "Verizon") informed Crown that its predecessor, NETC, had not obtained an easement agreement with the McKays prior to initially installing the underground conduit and copper wire telephone lines, neither do the McKays have knowledge or information that the easement agreement would be necessary to install fiber optic telephone lines, as the McKays were not privy to the conversations between the aforementioned parties. See Exhibit 3, ¶¶ 9 and 10.

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17. Although the Lease does permit Crown to update the telephone lines at the Property, the Lease does not require the McKays to execute a separate easement agreement with Crown or any third party. See Exhibit 1. The Lease granted a right-of-way in a specific location on the Property as identified on Exhibit 2, p. 2. This right-of-way is for the term of the lease only, and is not an easement. As stated in ¶ 4 of Section I of this Memorandum, the Lease states that "in the event any public utility is *unable to use* the aforementioned right-of-way, the Lessor hereby agrees to grant a *substitute* right-of-way either to the Lessee or to the public utility at no cost to the Lessee." See Exhibit 1, ¶ 1 (emphasis added). Unless and until this condition occurs, Crown is not entitled to a substitute right-of-way. Although not addressed in its Statement of Facts, Crown has alleged in the Argument section of its Memorandum in Support of Summary Judgment that Verizon Communications (hereinafter referred to as "Verizon") is unable to use the existing right-of-way. Crown does not explain why Verizon cannot use the existing right-of-way to install the fiber optic upgrades. See Crown Memorandum, Section I.B., p. 14. Moreover, even if Crown was entitled to a substitute right-of-way, such right-of-way would be in place of the existing right-of-way, not in addition to it. Crown has not even indicated where this proposed new right-of-way would be located, beyond language in its proposed easement that states, "It is agreed that the exact location of the facilities shall be established by the installation and placements of said facilities within said easement area." See Proposed Easement (Exhibit 7), ¶ 2. In any event, Crown is not entitled to two rights of way and is certainly not entitled to further encumber the McKays'

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land with an easement. Indeed, the Statement of Facts do not even allege that the McKays were required to sign the easement agreement, just that Crown has *reminded* the McKays that they are required to do so.

18. The McKays have refused to execute an easement agreement with Verizon because they are under no obligation to do so. See Defendants' Answer to Plaintiff's Complaint (Exhibit 8) , ¶ 41.

19. The McKays have no knowledge or information as to whether or not Verizon has installed the fiber optic telephone line to the Property, nor do the McKays have knowledge or information as to whether such is needed by Crown's subtenants. See Exhibit 3, ¶ 11. Regarding Crown's assertion that the upgrades are necessary in order to provide 911 service to its customers, during the summer of 2003, the McKays were approached by the Town of Carlisle Police Department about the possibility of the Department installing a police antenna to the communications tower so that they would be able to obtain 911 coverage in the Curve Street area of Carlisle. The McKays were agreeable to that arrangement, but they referred the Department to Crown because it is their tower. At this time, the McKays have not heard back from the Department or Crown regarding this issue, but are presenting it to show that the communications tower has 911 capabilities without the fiber optic upgrades. See Exhibit 3, ¶ 18.

20. From the beginning of the Lease period until the present day, the McKays have never obstructed Crown's use of the existing right-of-way granted under the Lease. See Exhibit 3, ¶¶ 12 and 13.

21. From the beginning of the Lease period until the present day, the McKays have

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never prevented Crown from upgrading the existing underground landline telephone service to the telecommunications tower. See Exhibit 3, ¶¶ 12 and 13.

22. The McKays have repeatedly told Crown that, if they claim they have the right to do something under the Lease, then they are free to do so. See Exhibit 3, ¶ 14.

23. From the beginning of the Lease period, and continuing to the present time, the McKays have personally observed various personnel including cell technicians, repair technicians, and people delivering propane for the backup generator at the cell tower, performing work at the Property. The McKays have observed that these people access the Property by cars and trucks through the existing right-of-way. See Exhibit 3, ¶ 15.

24. The McKays stand ready, willing and able to allow Crown to continue to use the right-of-way as they always have in the past. See Exhibit 3, ¶ 16.

25. From the beginning of the Lease period up until the time Crown filed suit in June 2003, and especially at the March 20, 2002, meeting, various parties representing Crown have threatened to sue the McKays if they did not grant an easement. These parties include but are not limited to James Donahue, Jeffrey Barbadora, Earl Duval and Daniel Klasnick. When the McKays were originally approached in 2000 regarding Crown's demands for an easement, they attempted to negotiate with Crown changes to the existing Lease. Crown, through its representatives, cut off negotiations with the McKays by simply stating that if they did not grant an easement, they would be sued, even though Crown did not offer any additional consideration for the McKays' granting the easement. See Exhibit 3, ¶ 17.

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II. DEFENDANT'S ELEMENTS OF LAW

1. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass.R.Civ.P. 56(c).

2. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue of fact and that it is entitled to judgment as a matter of law, and the moving party assumes this burden on every relevant issue, even on those issues on which it would have no burden if the case were to go to trial. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989), 532 N.E.2d 1211, 1213; *see also* Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734, 740 (1991).

3. "All doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment." Correllas v. Viveiros, 410 Mass. 314, 316-17, 572 N.E.2d 7, 9 (1991). (Citing Attorney Gen. v. Bailey, 386 Mass. 367, 371, 436 N.E. 2d 139, 143 (1982)).

4. It is the function of the trial judge, in ruling on a summary judgment motion, to look beyond formal allegations of facts in the pleadings and to determine whether further explanation of facts is necessary. Quincy Mutual Fire Insurance Co. v. Abernathy, 393 Mass. 81, 87, 469 N.E.2d 797, 801 (1984).

5. In analyzing the record on summary judgment, a court looks first to the moving party's affidavits to determine whether the moving party has satisfied its burden of showing no genuine issue of material fact. Salem Building Supply Co. v. J.B.L. Construction Co., Inc., 10 Mass.App, 360, 364, 407 N.E.2d 1302, 1306

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(1980).

6. "Summary judgment, when appropriate, may be rendered against the moving party." Mass.R.Civ.P. 56(c).

7. When both parties to a case set out essentially the same set of facts, the dispute is over what those facts mean, and in such case, summary judgment is appropriate. Genatossio v. Hanover Ins. Co., 6 Mass.L.Rptr. 619, 1997 WL 225694, 2 (Mass.Super. 1997).

8. "On a party's motion for summary judgment, judgment may pass for his opponent if the record warrants it, even in the absence of a cross-motion for that relief." Charlesbank Apartments, Inc. v. Boston Rent Control Administration, 379 Mass. 635, 636 n.2, 399 N.E.2d 1078, 1079 n.2 (1980).

9. A court may order full summary judgment even where a party only moves for partial summary judgment, provided the court gives sufficient notice to the parties, an opportunity for the parties to submit affidavits, and a right to be heard on the matter. Gamache v. Mayor of N. Adams, 17 Mass.App.Ct. 291, 296-296, 458 N.E. 2d 334, 337 (1983).

10. If the parties essentially agree on the facts, but the dispute is regarding the legal implications of those facts, the dispositive issue is purely one of law. Can-Am Drilling & Blasting Co., Inc. v. Intercoastal Development Corp., 1996 Mass.App.Div. 14, 1996 WL 63034, 3 (1996).

11. "When the words of a contract are clear they alone determine the meaning of the contract but, when a contract term is ambiguous, its import is ascertained from the parties' intent ..." Merrimack Valley Nat. Bank v. Baird, 372 Mass. 721, 723-24,

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363 N.E.2d 688, 690 (1977).

12. "An omission to specify an agreement in a written lease is evidence that there was no such understanding." Stop & Shop, Inc. v. Ganem, 347 Mass. 697, 701, 200 N.E.2d 248, 251 (1964) (Citing Snider v. Deban, 249 Mass. 59, 65, 144 N.E. 69, 72 (1924)).

13. "Covenants [in a contract] will not be extended by implication unless the implication is clear and undoubted." Id. (Citing Smiley v. McLauthlin, 138 Mass. 363, 364-365 (1884)).

14. The intent of the parties to a contract is manifested by "the circumstances surrounding [the Lease's] creation, such as relationship of the parties, actions of the parties and established business usages." Merrimack at 724; 363 N.E.2d at 690.

15. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Donaldson v. Farrakhan, 436 Mass. 94, 96, 762 N.E.2d 835, 837 (2002) (Quoting Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2512, 477 U.S. 242, 252 (1986)).

16. Where a lease "has terms that are ambiguous, uncertain, or equivocal in meaning, the intent of the parties is a question of fact to be determined at trial." Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779, 761 N.E.2d 946, 951 (2002).

17. The word "substitute" is defined as "that which stands in the place of another; that which stands in lieu of something else." Black's Law Dictionary 1429 (6th ed. 1990).

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18. An easement is an interest in land and it must be in writing to be enforceable. Mass. Gen. Laws ch. 259, § 1; Cook v. Stearns, 11 Mass. 533, 536 (1814).

19. "Ambiguous language in an agreement is to be construed against the drafter of the agreement." DeMoulas v. DeMoulas Super Markets, Inc., 424 Mass. 501, 570 n.72, 677 N.E.2d 159, 203 n.72 (1997) (Citing Massachusetts Turnpike Auth. v. Perini Corp., 349 Mass. 448, 454, 208 N.E.2d 807, 812 (1965)).

20. Intent of the parties to a contract can be shown by the parties' conduct, prior dealings, or established trade usage. Restatement (Second) of Contracts § 203 (1981).

III. ARGUMENT

A. Standard for Summary Judgment

The standard for summary judgment is set forth in Rule 56 of the Massachusetts Rules of Civil Procedure, which provides in part "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass.R.Civ.P. 56(c).

Crown, the moving party, bears the burden of affirmatively demonstrating the absence of a triable issue of fact and that it is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989), 532 N.E.2d 1211, 1213; *see also* Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734, 740 (1991). Crown assumes this burden on every relevant issue, even on those issues on which it would have no burden if the case were to go to trial. Pederson at 17, 532 N.E.2d

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at 1213. Moreover, "all doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment." Correllas v. Viveiros, 410 Mass. 314, 316-17, 572 N.E.2d 7, 9 (1991). (Citing Attorney Gen. v. Bailey, 386 Mass. 367, 371, 436 N.E. 2d 139, 143 (1982)).

It is the function of the trial judge, in ruling on a summary judgment motion, to look beyond formal allegations of facts in the pleadings and to determine whether further explanation of facts is necessary. Quincy Mutual Fire Insurance Co. v. Abernathy, 393 Mass. 81, 87, 469 N.E.2d 797, 801 (1984). In analyzing the record on summary judgment, a court looks first to the moving party's affidavits to determine whether the moving party has satisfied its burden of showing no genuine issue of material fact. Salem Building Supply Co. v. J.B.L. Construction Co., Inc., 10 Mass.App, 360, 364, 407 N.E.2d 1302, 1306 (1980).

In addition, "summary judgment, when appropriate, may be rendered against the moving party." Mass.R.Civ.P. 56(c). When both parties to a case set out essentially the same set of facts, the dispute is over what those facts mean, and in such case, summary judgment is appropriate. Genatossio v. Hanover Ins. Co., 6 Mass.L.Rptr. 619, 1997 WL 225694, 2 (Mass.Super. 1997). "On a party's motion for summary judgment, judgment may pass for his opponent if the record warrants it, even in the absence of a cross-motion for that relief." Charlesbank Apartments, Inc. v. Boston Rent Control Administration, 379 Mass. 635, 636 n.2, 399 N.E.2d 1078, 1079 n.2 (1980). Further, a court may order full summary judgment even where a party only moves for partial summary judgment, provided the court gives sufficient notice to the parties, an opportunity for the parties to submit affidavits, and a right to be heard on the matter. Gamache v. Mayor of N. Adams,

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17 Mass.App.Ct. 291, 296-296, 458 N.E. 2d 334, 337 (1983).

B. The Legal Implications of the Material Facts Preclude Finding Summary Judgment for Crown and Mandate Entering Summary Judgment for the McKays

In this case, the dispositive issue is purely one of law, because the McKays and Crown essentially agree on the facts, but the dispute is regarding the legal implications of those facts. Can-Am Drilling & Blasting Co., Inc. v. Intercoastal Development Corp., 1996 Mass.App.Div. 14, 1996 WL 63034, 3 (1996). Crown, as the moving party, has not met its burden of showing that the resolution of the issues of material fact necessitate a finding of summary judgment in its favor. The issue in this case is whether or not the McKays are obligated under the Lease to execute an easement agreement to Verizon. This is a matter of contract interpretation, and thus one of law.

1. Both of Crown's arguments -- that the Lease is unambiguous and that it is ambiguous -- fail to show that the McKays are obligated to grant an easement

In its Memorandum of Law in Support of its Motion for Summary Judgment, Crown's arguments are incongruous. See Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment. Crown argues both that the Lease is unambiguous and that the covenant on which it bases its claim for breach of contract -- that the McKays are obligated to grant Crown an easement -- is implied. Id., p. 12. "When the words of a contract are clear they alone determine the meaning of the contract but, when a contract term is ambiguous, its import is ascertained from the parties' intent ..." Merrimack Valley Nat. Bank v. Baird, 372 Mass. 721, 723-24, 363 N.E.2d 688, 690 (1977).

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If Crown's assertion that the contract is unambiguous is to stand, then there would be no reason to look to the parties' intent in forming the contract. Crown states that the lease requires the McKays to execute an easement agreement, yet nowhere in the lease is this language found. See Exhibit 1. "An omission to specify an agreement in a written lease is evidence that there was no such understanding." Stop & Shop, Inc. v. Ganem, 347 Mass. 697, 701, 200 N.E.2d 248, 251 (1964) (Citing Snider v. Deban, 249 Mass. 59, 65, 144 N.E. 69, 72 (1924)). Therefore Crown is wrong in stating that this is an unambiguous term in the Lease.

Since this is not an unambiguous term in the Lease, we would look to the intent of the parties in forming the contract. "Covenants will not be extended by implication unless the implication is clear and undoubted." Id. (Citing Smiley v. McLauthlin, 138 Mass. 363, 364-365 (1884)). The intent of the parties to a contract is manifested by "the circumstances surrounding [the Lease's] creation, such as relationship of the parties, actions of the parties and established business usages." Merrimack at 724; 363 N.E.2d at 690. Crown has proffered no evidence in any of these areas to show that the intent of the parties was for the McKays to grant an easement under the Lease. Crown has made nothing but a bald assertion that such in the case. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Donaldson v. Farrakhan, 436 Mass. 94, 96, 762 N.E.2d 835, 837 (2002) (Quoting Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2512, 477 U.S. 242, 252 (1986)). A reasonable jury could not find for Crown on the evidence it has presented.

Also, if Crown's assertion that we need to look at the intent of the parties in

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forming the Lease stands, this implied term is by definition ambiguous. Where, as here, a lease "has terms that are ambiguous, uncertain, or equivocal in meaning, the intent of the parties is a question of fact to be determined at trial." Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779, 761 N.E.2d 946, 951 (2002). Therefore, Crown cannot prevail on its Motion for Summary Judgment were the court to find that the term at issue in the contract is ambiguous.

2. Whether the Court finds that the Lease is unambiguous or ambiguous, the McKays are not obligated under the Lease to grant an easement

In contrast to Crown's position, the McKays are entitled to summary judgment whether the court finds that the Lease is clear or unclear.

a. It is clear that the Lease does not obligate the McKays to grant an easement

First, the Lease is clear on the issue that it does *not* obligate the McKays to grant an easement. As stated in Section I of this Memorandum, at ¶ 3, under the terms of the Lease, the McKays granted Crown's predecessor in interest "the non-exclusive right for ingress and egress, seven (7) days a week twenty-four (24) hours a day, on foot or motor vehicle, including trucks, and for the installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15') foot wide right-of-way extending from the nearest public right-of-way, Main Street, to the demised premises." Such right-of-way is drawn on a plan that was Exhibit A1 to the Lease, and is attached as Exhibit 2 to this Memorandum. This provision is very clear as to what the McKays grant for access and installation at the site, and does not contemplate the granting of some

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future easement to either Crown's predecessor in interest, or any third party.

The only condition under which a different *right-of-way* would be granted is stated in Section I of this Memorandum at ¶ 4, and states, "in the event any public utility is unable to use the aforementioned right-of-way, the Lessor hereby agrees to grant a substitute right-of-way either to the Lessee or to the public utility at no cost to the Lessee."

Crown has offered two mutually exclusive premises upon which it bases its argument that the McKays must grant an easement. Crown states that "Verizon Communications is currently unable to use the existing Right-of-Way, and therefore the Lease obligates the McKays to execute the Easement Agreement." Crown does not explain why Verizon cannot use the existing right-of-way to install the fiber optic upgrades. See Crown Memorandum, Section I.B., p. 14. Then Crown states that it "has the right to install fiber optic telephone lines in the already-existing conduit, and that the McKays are obligated to sign the Easement Agreement to facilitate this installation." Crown Memorandum, Section I.B., p. 16. If in fact Crown wants to install fiber optic telephone lines in the already existing conduit, this begs the question of how it proposes to do this if, as it claims, the company that is to install the lines, Verizon, is unable to use the existing right-of-way, which contains the existing conduit.

To the contrary, the condition in the Lease specifies that if a public utility is unable to use the right-of-way granted under the Lease, Crown would be entitled to a substitute right-of-way. Even if Crown were entitled to a substitute right-of-way, such right-of-way would be in place of the existing right-of-way, not in addition to it, as the word "substitute" is defined as "that which stands in the place of another; that which

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stands in lieu of something else." Black's Law Dictionary 1429 (6th ed. 1990). Crown has not specified a) whether it wants a new right-of-way and will surrender the existing right-of-way or b) whether it wants a new right-of-way in addition to the existing one. Crown has not indicated, nor provided plans for, where this proposed new right-of-way would be located, beyond language in its proposed easement that states, "It is agreed that the exact location of the facilities shall be established by the installation and placements of said facilities within said easement area." See Proposed Easement (Exhibit 7), ¶ 2. In any event, Crown is not entitled to two rights of way and is certainly not entitled to further encumber the McKays' land with an easement.

b. The obligation for the McKays to grant an easement is not an implied term in the Lease

Second, if the court finds that the Lease is unclear as to whether or not it obligates the McKays to grant an easement, Crown also fails on that argument, and the reasons are twofold. The first is that the Lease states, "It is agreed and understood that this Agreement contains all agreements, promises and understandings between the Lessor and Lessee and that no verbal or oral agreements, promises or understandings shall be binding upon either the Lessor or Lessee in any dispute, controversy or proceeding at law, and any addition, variation or modification to this Agreement shall be void and ineffective unless made in writing and signed by the Parties." See Exhibit 1, ¶ 15. Therefore, even if Crown produced some evidence to show the intent of the parties for the McKays to grant an easement, they have produced nothing in writing signed by both Crown and the McKays, and so would not be able to show the contemplated easement that way. Indeed, even if this language did not exist in the Lease, an easement is an interest in land and it

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must be in writing to be enforceable. Mass. Gen. Laws ch. 259, § 1; Cook v. Stearns, 11 Mass. 533, 536 (1814).

The second is that Crown's predecessor is the party who drafted the Lease. See Exhibit 3, ¶ 2. "Ambiguous language in an agreement is to be construed against the drafter of the agreement." DeMoulas v. DeMoulas Super Markets, Inc., 424 Mass. 501, 570 n.72, 677 N.E.2d 159, 203 n.72 (1997) (Citing Massachusetts Turnpike Auth. v. Perini Corp., 349 Mass. 448, 454, 208 N.E.2d 807, 812 (1965)). Since Crown is the successor to the drafter of the Lease and was assigned all of its successor's right, title, interest and obligation under the Lease (see Exhibit 5), any ambiguity shall be construed against Crown.

In sum, both of Crown's arguments that the Lease obligates the McKays to grant an easement fail. Its argument that the term of the Lease that requires the McKays to grant an easement is unambiguous fails because there is no such express term in the Lease. Correspondingly, its argument that such term shall be implied by the intent of the parties also fails because not only does such an ambiguous term get construed against Crown, but also Crown has shown no evidence of intent to grant an easement by the parties' conduct, prior dealings, or established trade usage. Restatement (Second) of Contracts § 203 (1981). Most importantly, Crown has produced no writing to show an easement agreement, which is required by the Statute of Frauds and the Lease itself.

C. The McKays have not Breached the Lease and have not Interfered with Crown's Advantageous Relations

The only obligation under the Lease that Crown alleges the McKays breached is to grant an easement. Because the McKays are under no obligation to grant an easement

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to Crown, Verizon, or any party, their refusal to do so is not a breach of the Lease. Count I of Crown's Complaint is Breach of Contract, and that is the only count upon which Crown moves for summary judgment. However, Count II, Interference with Advantageous Relations, is directly predicated on Count I. Because the McKays are not in breach of contract, it follows that they also have not interfered with Crown's advantageous relations. As such, the McKays respectfully request this Court to order full summary judgment even though Crown has only moved for partial summary judgment. Gamache v. Mayor of N. Adams, 17 Mass.App.Ct. 291, 296-296, 458 N.E. 2d 334, 337 (1983). The McKays incorporate all the arguments herein for the Court to enter summary judgment for the McKays on Counts I and II of Crown's Complaint.

D. Conclusion

For the reasons set forth above, this Court should 1) Deny Crown's Motion for Summary Judgment; 2) Enter summary judgment for the McKays; and 3) Grant such further relief as this Court deems just and proper.

Respectfully submitted,
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By their attorney:

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